No. 88-248

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RUBLOFF INC.,

Petitioner,

v.

LARRY SMITH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

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August 8, 1988

QUESTIONS PRESENTED

1. May a state court, in an action governed by the Federal Arbitration Act, refuse to enforce an arbitration agreement on the grounds that one of the issues in dispute may not be arbitrable?

2. May a state court, in an action governed by the Federal Arbitration Act, refuse to enforce an arbitration agreement based on the court's finding, made as a matter of law without a factual record and before any arbitrators were appointed, that the arbitrators to be appointed pursuant to the method provided in the agreement would be biased?

LIST OF PARTIES AND RULE 28.1 LIST

The caption of this case contains the names of all parties.

There are no parent companies, subsidiaries (except wholly-owned subsidiaries) or affiliates of Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

The petitioner RUBLOFF, INC. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Georgia, entered in the above-entitled proceeding on April 19, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals of Georgia is unreported and may be found as *Larry Smith v. Rubloff, Inc.*, No. 76002, slip op. (Ga. Ct. App. filed 4/19/88), and is reprinted in the appendix hereto, p. A-1, *infra.*

JURISDICTION

The judgment of the Court of Appeals of Georgia was entered on April 19, 1988, reversing the interlocutory order of the State Court of Fulton County, Georgia, which order stayed the litigation and compelled Respondent to arbitrate his claims. The Court of Appeals denied Petitioner's motion for rehearing on May 10, 1988. Thereafter, the Supreme Court of Georgia denied Petitioner's writ of certiorari to that court on June 9, 1988. On June 23, 1988, Petitioner gave notice to the Court of Appeals of Georgia of its intention to petition this Court for certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTE INVOLVED

The United States Arbitration Act, 9 U.S.C. §§ 2, 3, 5 and 10.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is

referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself for such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

§ 10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

STATEMENT OF THE CASE

Petitioner Rubloff, Inc. is the largest privately-owned national real estate brokerage firm in America. Rubloff's corporate headquarters is in Chicago, and it maintains regional offices in Atlanta, Chicago, Cincinnati, Houston, San Francisco and Washington, D.C.

Respondent Larry Smith is a former real estate associate of Rubloff in Atlanta. The relationship between the parties was conducted pursuant to a written "Independent Contractor Agreement" which provided that any disputes between associates would be arbitrated according to procedures set forth in the Rubloff Associates' Manual.

In March 1985, Rubloff obtained an exclusive brokerage agreement with the national law firm of Kutak, Rock and Campbell ("Kutak") to locate rental space for Kutak in metropolitan Atlanta. The Kutak firm was referred by another associate, Gail Peeler. Smith and a third Rubloff associate worked on the transaction until a lease was executed in November 1985.

Rubloff dispensed the total commission earned in accordance with Section I(E) of the Associates' Manual: Rubloff paid a 5% referral fee ($17,163.91) to Ms. Peeler, 22.5% ($77,237.64) to Smith and 22.5% (77,237.64) to the other associate working on the transaction, and retained 50% of the total commission.

Smith filed an action in the State Court of Fulton County, Georgia, in February 1987, claiming that Rubloff owed him $40,243.00 in additional commission. Smith's claim raised

three distinct issues: (1) whether Gail Peeler was entitled to a referral fee in connection with the Kutak transaction; (2) what was the "gross commission" received by Rubloff in connection with the Kutak transaction for purposes of calculating Smith's commission; and (3) whether Rubloff otherwise accurately calculated commissions owed to Smith pursuant to the Independent Contractor Agreement and Associates' Manual.

Rubloff answered and filed a motion to stay the litigation and compel arbitration in accordance with the parties' agreement. By Order dated July 6, 1987, the State Court found "that the transaction underlying this litigation was in interstate commerce pursuant to the United States Arbitration Act, 9 U.S.C. § 1 et seq., and that plaintiff's contract with defendant contains a valid and mandatory arbitration provision covering the issues raised by plaintiff." Consequently, the State Court ordered the litigation stayed and compelled arbitration in accordance with those procedures set forth in the Manual. The State Court's Order is reprinted in the appendix hereto, p. A-3, *infra.*

On appeal from this decision, the Court of Appeals reversed the trial court. The Court of Appeals did not disturb the finding that there was an agreement to arbitrate, and that the Federal Arbitration Act applied, but found that part of Smith's claim did not involve a dispute between associates, but involved instead disputes between Smith and Rubloff. Because part of the dispute was not subject to arbitration agreement, the Court of Appeals reversed the stay.

The Court of Appeals also held that, as a matter of law, "even if contractually applicable, the panel of arbitrators designated under the provisions of defendant's associates' manual . . . would render the arbitration provision invalid . . ." because the arbitrators would be biased. The Court of Appeals made this finding without a factual record. No arbitrators had in fact been appointed. The Court of Appeals opinion is reprinted in the appendix hereto, at p. A-1, *infra.*

REASONS FOR GRANTING THE WRIT

Introduction

The Court of Appeals decision here effectively repeals the Federal Arbitration Act in Georgia. The Court, contrary to clear and well-established federal law and policy, denied enforcement of a valid arbitration provision because part of the dispute involved non-arbitrable claims. Without any evidence in the record, the Court also concluded as a matter of law that the status alone of the potential arbitrators was sufficient to invalidate the arbitration agreement, based solely on the Court's assumption that bias might exist against the Respondent.

The Georgia state courts have long been hostile to arbitration. Note, *Commercial Arbitration in Georgia,* 12 Ga. L. Rev. 323 (1978). But such hostility does not permit the courts of any state to ignore applicable federal law. Because the Georgia Court of Appeals' holdings are contrary to controlling federal authority, this Court should accept certiorari.

Discussion of Questions

I. The Court Of Appeals' Invalidation Of An Arbitration Agreement Governed By The Federal Arbitration Act On The Grounds That A Portion Of Respondent's Claims Were Non-arbitrable Conflicts With Controlling Decisions Of This Court.

The instant case involves a contractual agreement for arbitration of disputes raised by Smith regarding the commissions paid to him and to his fellow associate, Gail Peeler. The contract is governed by the Federal Arbitration Act, 9 U.S.C. § 1, et seq. ("Act"). Section 3 of the Act states that motions to stay proceedings so as to enforce arbitration agreements must be granted where *an issue* is arbitrable. See p. 2 *supra.* The enforcement of the arbitration agreement in the instant case is

mandatory under the Act, and the Courts have no discretion to stay or prevent such arbitration.

Controlling decisions of the United States Supreme Court have settled this issue. See *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 217, 105 S.Ct. 1238, 1242 (1985):

> The Arbitration Act provides that written agreements to arbitrate controversies arising out of an existing contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed. §§ 3, 4. Thus, insofar as the language of the Act guides our disposition of this case, we would conclude that agreements to arbitrate must be enforced, absent a ground for revocation of the contractual agreement.

In *Byrd,* the United States Supreme Court reversed the District Court's denial of the motion of a defendant securities firm to compel arbitration of certain claims and to sever for litigation non-arbitrable claims asserted by the plaintiff customer. The decision adopted the view "that the Act, both through its plain meaning and the strong federal policy it reflects, requires courts to enforce the bargain of the parties to arbitrate, and 'not substitute [its] own views of economy and efficiency' for those of Congress." *Dickinson v. Heinold Securities, Inc.,* 661 F.2d 638, 646 (7th Cir.Ct. App. 1981)." *Id.* 105 S.Ct. at 1241.

The Supreme Court elaborated on the Act's legal mandate that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," even if piecemeal resolution of disputes is the unwanted offspring of enforcement of an agreement to arbitrate. *Id.* 105 S.Ct. at 1242.

> The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had

> entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is "piecemeal" litigation. . . .

Id. 105 S.Ct. at 1242-43.

In the instant case, the record and the contract require arbitration of Smith's claim that Peeler should not have received a referral fee. Section 9.1 in the contract governs such a dispute with another associate and requires arbitration.

The Court of Appeals erroneously concluded that Smith's dispute was "primarily" with Rubloff, and therefore invalidated the arbitration provision by not requiring Smith to arbitrate his dispute with his associate over her referral fee. Under the Act and the Supreme Court's ruling in *Byrd, supra,* the Court of Appeals decision must be reversed. Even assuming, *arguendo,* that Smith asserts both a claim or claims against Rubloff, which are not arbitrable, and a claim with another associate regarding the referral fee, which is arbitrable, the Court of Appeals decision defeats the federal law and policy under the Federal Arbitration Act by denying arbitration.

II. The Court Of Appeals' Refusal To Enforce The Arbitration Agreement On The Grounds of Bias Is Contrary To The Plain Meaning Of The Federal Arbitration Act And Controlling Authority.

The Federal Arbitration Act requires that state courts enforce the agreement of private parties to resolve private disputes through arbitration, including any agreement as to the appointment of arbitrators. "[I]f in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed." 9 U.S.C. § 5. See p. 3 *supra.*

Rubloff's Associates' Manual, at § VIA.3, provides for a three-person arbitration panel, consisting of one involved Rubloff local president and two associates, one of whom shall be from an office other than the one involved in the disagreement.

That panel is to review the statements of each party and provide a majority decision, which is final and binding. The arbitration clause therefore provides that two of the panel will be the complaining associate's peers. Since those peers are likely to view the dispute from their stance as commission-earning associates, bias is unlikely. None of the three potential arbitrators has a personal financial stake in the outcome of the arbitration. All of the arbitrators are knowledgeable in the brokerage business. Therefore, the method of selecting arbitrators is an efficient way to obtain impartial and knowledgeable arbitrators.

Respondent bargained for and agreed to this form of arbitration, and should be bound by the contract. *Merit Insurance Co. v. Leatherby Insurance Co.*, 714 F.2d 673 (7th Cir. 1983), *cert. denied*, 464 U.S. 1009 (1983) (parties to arbitration choose their method of dispute resolution, and can ask for no more impartiality than inheres in the method they have chosen.) See *Shearson/American Express Inc. v. McMahon*, ____ U.S. ____, 107 S.Ct. 2332.

In *McMahon, supra*, this Court reaffirms the strong federal policy favoring arbitration, even when a party to an arbitration agreement later seeks to escape its enforcement by claims of bias or unfairness. The Court notes that it is "well past the time when judicial suspicion of the desirability of arbitration and of competence of arbitral tribunals" should inhibit enforcement of arbitrations under the Act. An agreement to arbitrate should be enforced, absent fraud or excessive economic power that "would provide grounds for revocation of any contract." *Id.* 107 S.Ct. at 2337. The contract in the instant action is enforceable under law, including the arbitration provision.

The Court of Appeals' speculation as to potential bias is patently in error and severely chills the climate favoring contractual arbitration. First, it is directly contrary to Section 10 of the Act which provides that any challenges to the arbitrators are to be made after an award has been entered.

See p. 3 *supra.* Moreover, the court's gratuitous speculation concerning the partiality of the arbitrators to be appointed under the agreement is exactly the kind of judicial interference with the process of arbitration that the Act was designed to prevent. Any reasonably competent lawyer could fashion reasons for arguing that an arbitrator could be biased in the abstract and thereby stall arbitration in most cases.

Respondent is likely to be ***benefited,*** rather than prejudiced, by having arbitrators selected from other associates like himself. His panel will include persons best suited in terms of knowledge, experience and values to hear and appreciate Respondent's claims. The panel will have no economic stake in the outcome, and, indeed, will have no incentive to rule in favor of Peeler (or Petitioner) if that result would be adverse to the arbitrator's position in any similar commission disputes in which he may be involved. Further, there will be three (3) arbitrators on the panel, which further diminishes any basis to prejudge prospective bias sufficient to invalidate an award.

By analogy, it has long been accepted that arbitration panels selected among people in the securities industries are suitable to resolve customer-broker disputes. Judicial intervention is proper only upon a record evidencing bias or impropriety in an award. It is improper for courts to preemptively invalidate agreements to arbitrate based on presumptions of yet to be selected arbitrators. As this Court stated in *McMahon, supra,* 107 S.Ct. at 2340,

> we have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.

The Court of Appeals improperly relies upon the case of *Commonwealth Coatings Corp. v. Continental Casualty Co.,* 393 U.S. 145, 89 S.Ct. 337 (1968), to support the premise that inter-company arbitration is so unfair that the arbitration clause

is nullified. That case involved an appeal by a losing party from an arbitration award. The court found that, where it was disclosed after the arbitration that one arbitrator had a close financial relationship with one of the parties, the other party was entitled to have the award set aside. No case has been cited wherein an arbitration clause was found invalid in advance of arbitration, on the hypothetical premise that the arbitrators were likely to show partiality. As the Commonwealth Coatings case suggests, Respondent's claim of bias is not yet ripe and is properly brought only in a post-arbitration motion to vacate an award. *Florasynth, Inc. v. Pickholz,* 750 F.2d 171, 174 (2d Cir. 1984) (the Federal Arbitration Act does not provide for judicial scrutiny of an arbitrator's qualifications to serve, other than in a proceeding to confirm or vacate an award, which necessarily occurs after the arbitrator has rendered his service). To hold otherwise would result in the premature disqualification of the best-informed and most capable potential arbitrators.

CONCLUSION

For these reasons, Rubloff, Inc. respectfully requests that the Supreme Court accept certiorari in this case.

Respectfully submitted,

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August 8, 1988

APPENDIX "A"

In the Court of Appeals of Georgia
76002. SMITH v. RUBLOFF, INC.

Decided and Filed April 19, 1988
McMURRAY, Presiding Judge.

This is an action by plaintiff Smith, a licensed real estate agent and former independent contractor of defendant Rubloff, Inc., a real estate brokerage firm. Plaintiff alleges that working under an independent contractor agreement with defendant, he, along with Griffiths, procured an agency for a law firm for the purpose of finding office space for the law firm. Plaintiff further alleges that he, along with Griffiths, successfully negotiated and concluded a lease for the law firm for which the defendant Rubloff, Inc. was paid a commission. Plaintiff contends that he was entitled to a larger compensation from defendant in connection with this transaction than was paid to him and demands judgment for the balance due.

Defendant Rubloff, Inc. moved to stay litigation and to compel arbitration as to all of plaintiff's claims. The state court, "finding that the transaction underlying this litigation was in interstate commerce pursuant to the United States Arbitration Act, 9 USC § 1, et seq., and that Plaintiff's contract with Defendant contains a valid and mandatory arbitration provision covering the issues raised by Plaintiff," granted defendant's motion. We granted plaintiff Smith's application seeking interlocutory review of the state court's grant of defendant's motion to stay litigation and compel arbitration. Held:

The independent contractor agreement between plaintiff and defendant incorporates by reference the arbitration provisions of defendant's associates' manual. The arbitration provisions are applicable where a dispute arises between an associate (independent contractor) and any other associate or other person affiliated with defendant which cannot be settled by and between the parties involved. The arbitration provisions do not address a conflict between an independent contractor such as plaintiff and the defendant.

The larger part of the alleged shortfall in plaintiff's compensation arises from a rebate by defendant in excess of $81,000 to the law firm tenant. Thus, whole plaintiff seeks compensation based upon the sum originally received by defendant, defendant has calculated plaintiff's compensation based on the net after rebate. This portion of plaintiff's claim, as well as another involving the percentages to be used in the division of commissions between plaintiff and defendant, clearly do not involve any dispute between plaintiff and person affiliated with defendant. Such claims arise from a dispute between plaintiff and defendant, thus are not governed by the arbitration provisions relied upon by defendant.

Defendant contends plaintiff's disputes with it have been waived due to a failure on the part of plaintiff to provide notice of the dispute in compliance with a provision contained in the independent contractor's agreement between the parties. However, there has been no ruling by the state court on this contention and the effect of the state court's grant of defendant's motion to stay litigation and compel arbitration, is to submit plaintiff's disputes with defendant to arbitration. The scope of arbitration is set by the parties' contract and plaintiff's disputes with defendants are clearly beyond the scope of the arbitration agreement between the parties. Additionally, even if contractually applicable, the panel of arbitrators designated under the provisions of defendant's associates' manual (an employee and two associates (independent contractors) of defendant) would render the arbitration provision invalid as to a controversy between plaintiff and defendant. *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (89 SC 337, 21 LE2d 301). The state court erred in granting defendant's motion to stay litigation and compel arbitration. However, we express no opinion as to whether the state court may divert some limited portion of the issues in the case to arbitration.

Judgment reversed. Pope and Benham, JJ., concur.

IN THE

STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

LARRY SMITH,	*Plaintiff,*	CIVIL ACTION NO. 162067
vs.		
RUBLOFF, INC.,	*Defendant.*	Civil Action No. 162067

ORDER

Defendant Rubloff, Inc., having filed its Motion to Stay Litigation and to compel Arbitration, this Court having heard arguments of counsel for both parties and having considered the record, including written briefs and affidavits submitted by counsel for the both parties, the Court finding that the transaction underlying this litigation was in interstate commerce pursuant to the United States Arbitration Act, 9 U.S.C. § 1 et seq., and that Plaintiff's contract with Defendant contains a valid and mandatory arbitration provision covering the issues raised by Plaintiff,

IT IS HEREBY ORDERED that Defendant's motion be granted and that this litigation be stayed and arbitration of the disputes presented herein be compelled in accordance with those procedures set forth in Rubloff's Associates' Manual.

SO ORDERED this 6th day of July, 1987.

Jerry W. Baxter, *JUDGE*
STATE COURT OF FULTON
COUNTY